Supreme Court, U. S.
FILED
OCT 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DOCKET NO.
76-464

GERALD SHREIBER and STANLEY WEISS,
Petitioners,

vs.

UNITED INDUSTRIAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

RAYMOND M. VICTOR,
Counsel for Petitioners,
9th Floor,
1201 Chestnut Street,
Philadelphia, Pennsylvania 19107

RAYMOND M. VICTOR,
On the Petition

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Petition for a Writ of Certiorari to the Supreme Court of New York—Appellate Division 1

Opinion Below 2

Jurisdiction 3

Questions Presented 3

Constitutional and State Law Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

Conclusion 15

CASES CITED:

Bell v. Burson,
402 U.S. 535, 91 S.St. 1586,
29 L.Ed.2d 90 (1971) 13

Board of Regents v. Roth,
408 U.S. 564, 92 S.Ct. 2701,
33 L.Ed.2d 548 (1971) 13

Fuentes v. Shevin,
407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, reh. den. 409 U.S. 902, 93 S.Ct. 177,
34 L.Ed.2d 165 (1972) 12

Mullane v. Central Hanover Bank and Trust Co.,
339 U.S. 306 ,70 S.Ct. 652, 94 L.Ed. 865 (1950) .. 11

Owens v. I.F.P. Corporation,
374 F. Supp. 1032 (W.D. Ky. 1974) 10

Ramey v. Hewitt,
(Dist. Col. App.) 188 A.2d 350 (1963),
15 ALR 3d 586 10

TABLE OF CONTENTS

CASES CITED:

Sniadach v. Family Finance Corporation of Bay View,
395 U.S. 337, 89 S. Ct. 1820,
23 L.Ed. 349 (1969) 11

Stanley v. Illinois,
405 U.S. 645, 92 S. Ct. 1208,
31 L.Ed.2d 551 (1972) 13

U.S. CODE CITED:

28 U.S.C. 1257(3) 3

U.S. CONSTITUTION CITED:

Fourteenth Amendment 3, 7

MISCELLANEOUS CITED:

Civil Practice Law and Rules of State of New York
§3215(f)(i) 3, 9, 10, 12

TABLE OF CONTENTS

APPENDIX

Docket Entries 1a
Exhibit "A" 2a
Exhibit "B" 3a
Exhibit "C" 5a
Exhibit "D" 6a
Exhibit "E" 8a
Exhibit "F" 10a
Exhibit "G" 11a
Exhibit "H" 14a
Exhibit "I" 18a
Exhibit "J" 19a

SUPREME COURT OF THE UNITED STATES

Term, 1976

No.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK APPELLATE DIVISION

Petitioners respectfully pray that a Writ of Certiorari issue to review the order and decision on the merits of the Supreme Court of New York—Appellate Division entered on February 2, 1976. Leave to appeal from this latter decision was requested of the Court of Appeals of New York, which Court dismissed the appeal on July 8, 1976.

OPINION BELOW

The final order of the Court of Appeals of the State of New York was made and entered on July 8, 1976 and provides as follows:

> Motion for leave to appeal dismissed, with twenty dollars costs and necessary reproduction disbursements, upon the grounds that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution and involves the exercise of discretion of a type not reviewable by the Court of Appeals.

This final order is unreported to date but may appear in decisions reported in 39 N.Y.2d—when said volume is printed.

The underlying order and opinion from which leave to appeal was dismissed was rendered by the Appellate Division of the Supreme Court of the First Judicial Department in the County of New York. The order of the Appellate Division of the Supreme Court of New York County, which denied Petitioners Motion to vacate a default judgment taken against them.

The order and opinion of the Appellate Division of the Supreme Court of the First Judicial Department in the County of New York is set forth herein, *infra*, at pages 11a to 13a, Exhibit G.

The opinion of the Appellate Division of the Supreme Court of New York is reported at 379 N.Y.S.2d 404 (1976).

JURISDICTION

The final order of the Court of Appeals of the State of New York was made and entered on July 8, 1976, and is appended hereto, *infra*, at page 10a, Exhibit F. The Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States entitle Petitioners to prior notice of an assessment of damages hearing, which hearing is held subsequent to the entry of a default judgment against them based upon a summons which does not set forth adequate notice of the basis of the alleged cause of action against them.

2. Does Section 3215(f)(i) of the Civil Practice Law and Rules of the State of New York violate the due process clause of the Fourteenth Amendment to the United States Constitution when it does not require prior notice to Petitioners of an assessment of damages hearing held pursuant to the entry of a default judgment against Petitioners.

CONSTITUTIONAL AND STATE LAW INVOLVED

The principal constitutional provision involved is the Fourteenth Amendment of the Constitution of the United States and Section 3215 of the Civil Practice Law and Rules of the State of New York, set forth hereafter at pages 14a to 17a, Exhibit H.

STATEMENT OF THE CASE

Petitioners, Gerald Shreiber and Stanley Weiss, were, prior to July of 1970, the sole owners and stockholders of a Pennsylvania Corporation known as Sandmar Manufacturing Company (hereinafter referred to as Sandmar of Pennsylvania). On or about July 7, 1970, Petitioners sold their entire interest in Sandmar of Pennsylvania and three other related corporations to Respondent, United Industrial Corporation, a corporation with its principal place of business at 660 Madison Avenue, New York, New York. The result of that sale was that Sandmar of Pennsylvania and the three other related corporations were reorganized into a new corporation, namely Sandmar Manufacturing Company, a Delaware Corporation (hereinafter referred to as Sandmar of Delaware).

Pursuant to the provisions of the sale contract, the Petitioners were named officers and directors of Sandmar of Delaware. Sandmar of Delaware had its principal place of business in Pennsylvania and Petitioners resided in Pennsylvania.

After the above sale, differences arose between Petitioners and Respondent regarding management of Sandmar of Delaware and Respondent, on or about April 28, 1971, terminated Petitioners' employment and removed them as officers of Sandmar of Delaware.

On or about May 6, 1971, a meeting between Petitioners and representatives of Respondent was held at Respondent's offices in New York City. The purpose of the meeting was to attempt to reconcile the difference between the parties. During the meeting, further differences arose and an officer of Respondent called into the room a man who "served" Petitioners with a summons. The summons

contained notice of a cause of action for recovery of damages sustained by Respondent as a result of Petitioners' alleged deceit, fraud, misrepresentation and breach of contract. A copy of said summons is attached hereto as Exhibit "A." Petitioners protested this irregular service and their counsel in attendance, Mr. Shay, advised them that he would handle this matter. What was allegedly served upon the Petitioners was a summoms. Petitioners never received nor were served with a complaint setting forth the base of the claim against them.

Philadelphia counsel selected New York counsel to act for Petitioners, such counsel being Harvey G. Wolfe, Esquire, a member of the Bar of the State of New York. Mr. Wolfe communicated with Respondents and obtained an extension to June 15, 1971 by which to enter an appearance. Mr. Wolfe was under the impression settlement negotiations were taking place as to the entire matter involving financial suits and countersuits, so he did nothing further.

On August 10, 1971 Attorney for Respondent indexed the Summons with the trial court and on October 29, 1971 appeared before the trial judge of the Supreme Court of New York for inquest and assessment of damages. A hearing was held on the matter and trial judge assessed damages against the Petitioners in the sum of $260,721.50 inclusive of interest and costs.

Attached hereto as Exhibits are:

Exhibit B—Finding of fact and conclusions of Law of trial judge.

Exhibit C—Judgment rendered by trial judge.

At no time did either of petitioners or Harvey J. Wolfe, Esquire, receive any notice in any way whatsoever that a

hearing was to be held on October 29, 1971 the purpose of which was to enter a default judgment and assess damages upon evidence.

The Petitioners first received notice that judgment was entered against them when the New York Judgment was transferred to the Court of Common Pleas of Montgomery County, Pennsylvania on January 28, 1972 pursuant to the Uniform Enforcement of Foreign Judgment Act. Upon recent action of the Judgment in Montgomery County, Pennsylvania, the Prothonotary of the Court sent petitioners notice that judgment had been filed. This was their first notice of the judgment.

A motion was filed with the Supreme Court for the County of New York to vacate the judgment. The motion was denied by the trial judge. An appeal was taken to the Appellate Division of Supreme Court of New York and this court affirmed the trial judge's dismissal of the Motion to Vacate the judgment. A request for reargument was denied. A motion for leave to appeal was taken to the Court of Appeals of the State of New York and the motion for leave to appeal was dismissed.

REASONS FOR GRANTING THE WRIT

Petitioners were served with a summons in New York, stating that the object of the cause of action was the recovery of damages suffered by Respondent (Plaintiff below) due to Petitioners' fraud, misrepresentation, deceit, breach of contract, malfeasance. In addition, said summons sought damages of $250,000.00 and required an appearance within 20 days of the service of the summons. After Petitioners failed to enter an appearance, a default judgment was entered against them. The New York Supreme Court violated the due process clause of the Fourteenth Amendment to the United States Constitution when said Court proceded to a hearing on assessment of damages and accepted evidence thereof without prior notice to Petitioners of the assessment of damages hearing so that the Petitioners could defend themselves against the extent of the damages, if any. The notice of the action set forth in the summons was inherently one of unliquidated damages.

The Petitioners appeared in New York after traveling from Philadelphia at the invitation of the Respondent. For the purpose of this writ, the undisputed fact is that the Respondent handed the Petitioners a summons which is set forth herein as Exhibit "A." The summons was handed to Petitioners on May 6, 1971. An attorney purportedly acting for the Petitioners at that time requested an extension of time to appear to June 15, 1971. He failed to so appear for reasons not relevant here.

On October 29, 1971, the attorney for the Respondent appeared before a trial judge of the Supreme Court of New York for inquest and assessment of damages. It is undisputed that no prior notice of the hearing on the assessment of damages was given either to Petitioners

or their attorney purportedly acting on their behalf who had previously requested an extension of time. The hearing proceeded and the trial judge accepted exhibits on behalf of the Respondent, which alleged facts of purported violations of federal, state, and local law, and Respondent further submitted a schedule setting forth itemized damages. Items marked "Plaintiff's (Respondent's) Exhibit II and Exhibit III and attached hereto as Exhibits "D" and "E" were received by the Court in evidence.

What happened was that a trial judge accepted evidence of the nature and extent of the damages without affording the Petitioners the right to contest or defend against the amount of the damages.

It is one thing for a court to say that liability is determined against the litigant for failure to appear, but it is quite another thing to assess damages against that person without affording him an opportunity to defend against the same. The summons here claims the sum of $250,000. This sum is not liquidated on the face of the summons and the cause of action relied upon, such as fraud, deceit, misrepresentation, and malfeasance, are inherently unliquidated in so far as damages are concerned. With respect to breach of contract, no specifics were set forth as to the damages involved. So as to the summons, this item of damages is not liquidated.

A default judgment may preclude a defense on liability; it does not preclude a defense as to damages. Conceivably, a person may be at "fault" or "liable" under our system of jurisprudence by default, but is not liable in damages unless the same are proven. An example is the six-cent judgment at common law for trespass Q.C.F.

The Petitioners maintain that the Court on its own motion and the Respondent and their attorney had a responsibility to make some effort to give notice to Petitioners that a hearing for assessment of damages was to be held in the instant case. The failure to do so denies the Petitioners due process under the Constitution for failure to give notice of the assessment of damages hearing and furthermore deprives Petitioners of their property without due process when a judgment is entered against them in the staggering amount of $250,000, exclusive of interest and costs.

This represents a sneak judgment where the parties steal into the courtroom, give no notice, assess damages without contest, all under the cover of law.

The Petitioners did not learn of the judgment entered against them until almost three months later when the same was recorded in their home state of Pennsylvania under the Uniform Enforcement of Foreign Judgments Act, Act of December 22, 1965, P.L. 1157 Section 1 *et seq.*, 12 P.S. 921, *et seq*. They then made every effort to vacate the judgment. At this point they have now been told by the Appellate Division of the Supreme Court of New York that under the procedural rules of New York, Civil Practice Law and Rules 3215(f)(1) marked as Exhibit "H," no notice of the assessment of damages hearing was given nor was such notice required to be given.

There are two integral parts of a default judgment. One has to do with the issue of liability or responsibility and whether the defendant by his default is precluded from defending the liability aspect of the claim against him. The second part of a default judgment has to do with damages. If one assumes that the defendant is liable or responsible, to what extent is he liable in terms of money? There is a split of authority on the subject of prior notice on assessment of damages and insofar as is known to Petitioners, this is a case of first impression before this Court. The specific question becomes whether or not a defaulting defendant has a right to notice of a

hearing on the amount of damages to be assessed against him. The Petitioners contend that they have a right to notice and that a failure of prior notice to them violates their constitutional rights to be free of a deprivation of property without due process. The Appellate Division of the Supreme Court of New York maintains that under Civil Practice Law and Rules Section 3215 (f)(1) no such prior right of notice was required.

Petitioners maintain that such notice is required and therefore the above rule of procedure, based on the facts herein, is unconstitutional as violative of the Petitioners' right not to be deprived of their property without due process of law. There is a split of authority as to whether or not the defaulting defendant has a right to notice and hearing as to the determination of the amount of damages. The divergent opinions are set forth in *Ramey v. Hewitt,* (Dist. Col. App.) 188 A.2d 350 (1963) and further discussed in an annotation at 15 ALR 3d 586.

In spite of this split of authority among the states, it should be noted that no litigant, so far as Petitioners know, has heretofore raised a constitutional issue of due process on the basis of no prior notice to an assessment of damages hearing. Certainly this Court appears not to ever have decided the issue.

This Court has, however, dealt with the sufficiency of notice of a Kentucky summons in *Owens v. I.F.P. Corporation,* 374 F. Supp. 1032 (W.D. Ky. 1974). There, apparently, a default judgment was taken on failure of the Defendant to respond to a summons which contained a notice of the action and steps to be taken to avoid default. It required the defendant to "appear and defend" and warned that a default judgment "will" be taken for failure to appear and defend. A Three-Judge District Court held that such notice was sufficient and did not

violate the due process requirements of the Constitution. The summons was similar to the one served upon Petitioners here. The Three-Judge District Court decision was affirmed by this Court without opinion at 419 U.S. 807, 95 S.Ct. 23, 42 L.Ed.2d 36 (1974). However, the case is devoid of any issue concerning notice of an assessment of damages hearing, the next logical step in the Civil Process. One can only assume that the Defendants there received notice of such a hearing or chose not to raise a constitutional issue if they did not in fact receive notice. The attack was limited to sufficiency of the summons.

Here, Petitioners raise an issue of deprivation of property without due process because they received no notice of the second step in the process of taking their property, namely, lack of notice of the hearing where the extent of the damages are to be determined. In recent years, this Court has been called upon to decide a number of "notice and hearing" questions on a variety of contexts. Petitioners' position is similar that the underlying constitutional principles applicable in those cases apply to the context in which Petitioners find themselves.

In *Sniadach v. Family Finance Corporation of Bay View,* 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 349 (1969), this Court struck down Wisconsin's prejudgment wage garnishment. It was there decided that an employee was constitutionally entitled to notice and a hearing *before* his wages were attached. Quoting from *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950), this Court reiterated that the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. It may well be argued that Petitioners here had received notice of the pendency of the hearing by service

of the summons upon them. However, it was not the entry of the default judgment that deprives them of their property but the assessment of damages hearing, the result of which was reduced to judgment, that deprives them of their property. Are Petitioners not entitled to notice at each step along the way to final judgment, or is the right to notice lost forever upon failure to respond to the summons?

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 reh. den. 409 U.S. 902, 93 S. Ct. 177, 180, 34 L.Ed. 2d 165 (1972), the Florida and Pennsylvania replevin statutes were held constitutionally invalid for failing to provide for notice and hearing prior to seizure. On constitutional principle, the holding is quite similar to the decision in *Sniadach*. Both decisions dealt with a seizure of property prior to a hearing and notice thereof. A stove and a stereo, both purchased on a conditional sales contract, had been seized by the Sheriff. The writ authorizing that action was issued by a court clerk on the basis of a form application filed by the vendor. Under the Florida statute, there was an automatic reliance on the "base assertion" of the party seeking the writ that he is entitled to one and this allows a court clerk to issue the writ summarily." This Court, however, held that such assertion was insufficient and that notice and hearing must be *prior* to seizure.

Petitioners note with interest that the summons served upon them contained only a bare assertion that Petitioners were liable to respondent for certain conduct in the amount of $250,000 and on that base assertion respondent claims it was entitled to a hearing on damages without notice to Petitioners for failing to respond to the summons. Respondent was granted this extraordinary privilege under the provision of Civil Practice Law and Rules 3215(f)(i).

As the opinion in *Fuentes* points out, the fundamental right to notice and a hearing includes the notice of a hearing at a "meaningful time." Both the Florida and Pennsylvania statutes provided for notice and hearing *after* seizure. This was not at a "meaningful time." Petitioners claim here that the most meaningful time for them was when evidence was heard on the nature and extent of the damages. Without notice of the hearing held on October 29, 1971, they had no opportunity to present evidence, rebut Respondent's evidence or cross-examine witnesses on the issue of damages. Thus, they were deprived of notice at the most meaningful stage of the proceedings against them.

This court has also dealt with notice and hearing requirements on other situations, such as, *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L.Ed. 2d 90 (1971) holding a person to be entitled to a hearing on fault before there could be a suspension of a drivers license, *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed. 2d 548 (1972), entitling professors to a hearing on the grounds of termination prior to dismissal and *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972) which held an unwed father to be entitled to a hearing on his parental fitness prior to his children being declared wards of the state.

There is little doubt that the foregoing line of cases, most especially *Fuentes* and *Sniadach*, were dealing in situations where persons were deprived of property or a property right without a hearing on the *merits* of the case against them. Here, it could be said, the Petitioners waived or surrendered their rights to a trial on the merits when they failed to respond to the summons. Thus, the foregoing cases are not supportive of Petitioners' position. However, within the context of the Petitioners' cir-

cumstances, certainly the most important stage is the determination of the damages against them, if any. And, certainly, their failure to respond ought not to deprive them of constitutional due process with respect to the hearing where it is determined *how much* they are liable. Their failure to respond on the merits ought not, constitutionally, to deprive them of material on the assessment of damages hearing. To do so, deprives them of the motive at a most "meaningful time" in the proceedings against them.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Raymond M. Victor
Counsel for Petitioners
1201 Chestnut Street
9th floor
Philadelphia. Pennsylvania 19107

APPENDIX

DOCKET ENTRIES

Index No. 17506
United Industrial Corporation, Plaintiff

against Gerald Shreiber, Defendant
S. Nimberger, 660 Madison

Month Day Year

Aug. 10, 1971—Summons with Notice

Sept. 10, 1971—Order Spec. II Direct Clerk

Sept. 20, 1971—Note of Issue

Oct. 21, 1971—Consent to Substitution of Attorneys

Nov. 24, 1971—Judgment Micro 62312

Nov. 24, 1971—Bill of Costs

Nov. 2, 1972—Order Spec. I Vac. Judg Denied

Dec. 11, 1972—Notice of Appeal

Feb. 4, 1976—Remittiter

May 21, 1976—Costs

May 21, 1976—Copy Order

EXHIBIT "A"

SUMMONS

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

SAMUEL HIMBERGER
Attorney for Plaintiff
Office and Post Office Address
660 Madison Avenue
New York, New York
Tel. (212) 752-0787

DATED: April 30, 1971.

Notice: The object of this action is recovery of damages suffered by defendants' fraud, misrepresentation, deceit, breach of contract and malfeasance.

The relief sought is the sum of $250,000.00.

Upon your failure to appear, judgment will be taken against you by default for the sum of $250,000.00 with interest from April 30, 1971 and the costs of this action.

EXHIBIT "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendants herein, having defaulted in appearance, and the issues of this action having duly come on for inquest and assessment of damages, before Mr. Justice Ivan Warner, one of the Justices of this Court, at Trial Term, Part XXIII thereof, held in and for the County of New York in the City of New York in said County, on the 6th day of October, 1971, and having heard the allegations and proofs of the plaintiff, and due deliberation having been had thereon, and upon said inquest the title of the action having been amended to delete therefrom Sandmar Manufacturing Co.

NOW, after hearing Louis C. Fieland, Esq., of Counsel to attorney Pollan, Zimmer, Fishbach & Herdan, Esqs., substituted attorneys for the plaintiff, I do hereby make the findings of essential facts which I deem established by the evidence:

FINDINGS OF FACT

1. That the plaintiff United Industrial Corporation with a principal place of business at 660 Madison Avenue in the City, County and State of New York entered into an Agreement made the 7th day of July, 1970 with various parties, including Gerald Shreiber of Huntington Valley, Pa. and Stanley Weiss of Philadelphia, Pa., the said Shreiber and Weiss, jointly and severally being referred to in said agreement collectively as "Principals."

2. In said Agreement, the defendants, as principals, made various representations and warranties.

3. Said representations and warranties were, to the knowledge of the defendants, in a number of material

respects, false and misleading; and the defendants did, in material respects, breach said Agreement.

4. In reliance upon the aforesaid representations and warranties of the defendants, United Industrial Corporation did invest and make advances to Sandmar Manufacturing Co., a Delaware corporation, the sum of $252,299.00.

5. Sandmar Manufacturing Co. was and now is completely insolvent and the aforesaid investment and advances made by United Industrial Corporation have become worthless.

CONCLUSION OF LAW

The plaintiff, United Industrial Corporation is entitled to recover from the defendants, Gerald Shreiber and Stanley Weiss, jointly and severally, the sum of $250,000, together with interest from May 1, 1971, and its costs and disbursements.

It is therefore

ORDERED that judgment be entered herein in favor of the plaintiff, United Industrial Corporation of 660 Madison Avenue, in the County, City, and State of New York against the defendants Gerald Shreiber, of Huntington Valley, Pa. and Stanley Weiss, of Philadelphia, Pa. in the sum of $250,000, together with interest thereon from May 1, 1971 to the date of the entry of the judgment herein, together with plaintiff's costs and disbursements herein.

Submit judgment.

DATED: October 29, 1971.
New York, New York

/s/ Ivan Warner
JUSTICE OF THE SUPREME
COURT OF THE STATE OF
NEW YORK

EXHIBIT "C"

JUDGMENT

The summons with notice in this action having been personally served on Gerald Shreiber of Huntington Valley, Pa. and Stanley Weiss of Philadelphia, Pa., the defendants herein, and the time of said defendants to appear or answer having expired, and the said defendants not having appeared or answered herein, and this action having duly come on for inquest and assessment of damages before Mr. Justice Ivan Warner, one of the Justices of this Court at Trial Term, Part XXIII thereof, held in and for the County of New York in the City of New York on the 6th day of October, 1971, and after hearing the allegations and proofs of the plaintiff, and due deliberation having been had thereon, and Mr. Justice Ivan Warner having duly made Findings of Fact and Conclusions of Law, and having directed that judgment herein be entered in favor of the plaintiff and against the defendants, and upon said inquest the title of the action having been ordered amended to delete therefrom Sandmar Manufacturing Co. v. plaintiff.

NOW, on motion of Pollan, Zimmer, Fishbach & Hertan, substituted attorneys for the plaintiff, it is,

ADJUDGED that plaintiff United Industrial Corporation of 660 Madison Avenue, New York, New York do recover jointly and severally of Gerald Shreiber and Stanley Weiss, the sum of $250,000, the amount claimed with interest from May 1, 1971 to the date hereof in the sum of $10,572 and with $149.00 costs and disbursements, amounting in all to the sum of $260,721.56, and that plaintiff have execution therefor.

/s/ Norman Goodman,
Clerk

/s/
J.S.C.

EXHIBIT "D"

SANDMAR MANUFACTURING COMPANY VIOLATION OF FEDERAL, STATE AND LOCAL LAWS BY SHREIBER AND WEISS

1. Failure to pay Federal, State and local government payroll taxes collected by Sandmar Manufacturing Company from employees from 5/31/70 thru 4/30/71, in specific violation of Federal, State and local laws. As a result thereof, Sandmar was assessed interest and penalties and incurred legal fees to secure a discharge of the liens and penalties imposed by the Internal Revenue Service. Total amount of damages approximately $6,000. In addition, the Company's credit reputation was severely damaged.

2. Violation of Workmens' Compensation laws by permitting Workmens' Compensation policies to lapse for nonpayment of policies.

3. Violation of Federal and State Unemployment Insurance laws by failure to file and pay taxes based on payroll of the Company.

4. Violation of Federal Income Tax laws by failure to file and pay taxes for periods prior to 7/29/70.

5. Violation of Pennsylvania Franchise, Income and Excise Tax laws by failure to file and pay applicable Pennsylvania taxes for periods from 5/31/70 thru 4/30/71. Principals also failed to file required tax returns for periods prior to 5/31/70 in specific contravention of warranties that all tax returns had been filed and all taxes had been paid.

6. Violation of Property Tax laws by failure to pay property taxes due against real estate of Weiss-Shreiber Development Corporation.

7. Violation of Federal and State laws by employing persons and classifying them as Consultants versus employees, and as a consequence, failing to withhold taxes on such employees and failing to carry Workmens' Compensation insurance on such employees.

8. Violation of Federal and State laws by agreeing with employees to not report such persons as employees and not collecting withholding taxes.

9. Violation of Federal and State laws by falsifying hours worked by employees.

SUPREME COURT

People's Exhibit
Plaintiff's Exhibit 2
Defendant's Exhibit
/s/ E. Schwartz

DATED: Oct. 6, 1971.

EXHIBIT "E"

SANDMAR MANUFACTURING COMPANY
SCHEDULE OF UNRECOVERED INVESTMENT
BY UNITED INDUSTRIAL CORPORATION

A.	Initial Equity Payment		$ 67,357
B.	Advances by way of United Industrial Corporation Notes:		
	1. Per terms of 7/7/70 agreement:		
	7/29/70 $47,643		
	8/23/70 52,357	$100,000	
	2. For payment to Internal Revenue Service for failure to pay withholding taxes collected from employees	25,900	
	3. To cover bank loan called by bank:		
	1/11/71 15,000		
	2/12/71 35,000°	50,000	
	4. To meet liquidity crisis:		
	3/9/71 10,000°		
	4/3/71 10,000°	20,000	
	(° These loans were secured by a Sale and Leaseback agreement for $55,000 of fixed assets)		
	TOTAL		195,500
C.	Inter-company charges to 4/30/71, including interest on loans	13,088	
D.	Current costs incurred during period of liquidation (4/30/71 to 9/30/71)	16,117	

E.	Estimated costs to complete liquidation	15,000	44,205
	TOTAL		317,462
F.	Less repayments received:		
	1. To 9/30/71	65,163	
	2. Future payments anticipated		
	TOTAL		65,163
G.	Net Total Unrecovered Investment		$252,299

SUPREME COURT

People's Exhibit
Plaintiff's Exhibit 3
Defendant's Exhibit
/s/ E. Schwartz

DATED: Oct. 6, 1971.

EXHIBIT "F"

OPINION OF NEW YORK COURT OF APPEALS JULY 1976

Motion for leave to appeal dismissed, with twenty dollars costs and necessary reproduction disbursements, upon the grounds that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution and involves the exercise of discretion of a type not reviewable by the Court of Appeals.

EXHIBIT "G"

ORDER AND OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FEBRUARY 2, 1976

APPEAL NO. 1694N

An appeal having been taken to this Court by the defendants-appellants from an order of the Supreme Court, New York County (Warner, J.), entered on November 1, 1972, denying defendants' motion to vacate default judgment, and said appeal having been argued by Mr. Harvey G. Wolfe of counsel for the appellants, and by Mr. Louis C. Fieland of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondent shall recover of appellants $40 costs and disbursements of this appeal.

ENTER:

/s/ Hyman W. G
Clerk

Order, Supreme Court, New York County (Warner, J.), entered November 1, 1972, which denied defendants-appellants' motion to vacate default judgment entered in this action, unanimously affirmed. Respondent shall recover of appellants $40 costs and disbursements of this appeal.

In substance, defendants asserted four separate grounds for their motion. These are considered *seriatim*.

(1) Defendants contended the court lacked jurisdiction over them because service of summons was invalid. They claimed they were enticed into New York by plaintiff in order to serve them with process. The record does not sustain the argument that appellants were inveigled into this jurisdiction by respondent. On the contrary, it appears that they were constantly coming to New York for board of directors meetings of Sandmar Manufacturing Company. There does not appear to have been a scheme on the part of respondent to lure appellants into New York in order to serve them with process. *Olean St. Ry. Co. v. Fairmount Const. Co.*, 55 App. Div. 292, upon which appellants rely, is distinguishable. In *Olean*, defendant, at the suggestion of plaintiff, made one solitary trip to New York, specifically and solely to discuss settlement of a matter. Such is not this case, where although settlement discussions were in progress, they were intertwined with and formed part of the regular business of the board of directors of Sandmar, of which appellants were members and whose meetings they attended. Accordingly, service of process was valid.

(2) Defendants contended the court should have declined jurisdiction over the action on the doctrine of *forum non conveniens*. They claimed that Pennsylvania, rather than New York, was the proper forum for this action, since the issues involved pertained to matters in Pennsylvania, defendants resided there, and actions between the parties

concerning the same subject matter were pending in that State. While Sandmar is a Delaware corporation, whose business interests are located in Pennsylvania, its headquarters are in New York. Respondent, too, is a New York based corporation. Appellants were in New York City many times to attend board of directors meetings of Sandmar. Trips to New York did not impose any hardship upon them. Further, despite appellants' contentions, the Pennsylvania actions did not cover the same subject matter as the New York action. Accordingly, defendants' argument that this proceeding should have been more appropriately brought in Pennsylvania is without merit.

(3) Defendants contended that the entry of default judgment without notice to them was improper. They claimed that they were entitled to such notice, as plaintiff was aware that they were represented by counsel. Defendants' counsel did not, however, serve and file a notice of appearance in the action. It should be noted that less than one year elapsed since the default. Accordingly, notice of plaintiff's intention to obtain and enter a default judgment was not required (*cf.* CPLR §3215(f)(1)).

(4) Defendants contended their default was excusable (CPLR §5015(a)(1). They claimed they did not appear or answer in the action because they thought the matter would be settled. A motion under this Section to open a default is addressed to the discretion of the court. To succeed, movants must establish (a) that their default was excusable (CPLR §5015(a)(1); *Krebs v. Raborg*, 30 A D 2d 520), *and* (b) that they have a meritorious defense to the action (*Hurley v. Reoux*, 29 A D 789). Appellants' belief that the matter would be settled did not excuse their default. Further, they did not evidence a meritorious defense. On these facts it was not an abuse of discretion by the court below to deny appellants' motion. (*Bouxsein v. Bialo*, 35 A D 523).
Order filed.

EXHIBIT "H"

Civil Practice Law and Rules §3215

§3215. Default judgment.

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be

necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(d) Place of application to court. An application to the court under this section may be made, except where otherwise prescribed by local court rules, by motion at any trial term in which the action is triable or at any special term in which a motion in the action could be made. Any reference shall be had in the county in which the action is triable, unless the court orders otherwise.

(e) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the de-

(f) Notice.
fendant, describe the property and state its value.

1. Notice is not required when the judgment may be entered by the clerk. Except as otherwise provided with respect to specific actions, if application must be made to the court, any defendant who has appeared is entitled to at least five days' notice of the time and place of the motion, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may also dispense with the requirement of notice when a defendant who has appared has failed to proceed to trial of an action reached and called for trial.

2. Where an application for judgment must be made to the court, the defendant who has failed to appear may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally.

(g) Judgment for excess where counterclaim interposed.

In an action upon a contract where the complaint demands judgment for a sum of money only, if the answer does not deny the plaintiff's claim but sets up a counterclaim demanding an amount less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim may take judgment for the excess as upon a default.

(h) Default judgment for failure to comply with stipulation of settlement. 1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount

with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

2. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based.

EXHIBIT "I"

OPINION AND ORDER OF WARNER, J., SUPREME COURT OF NEW YORK NOVEMBER 2, 1972

The following papers numbered 1 to 28 read on this motion SUBMITTED.

No. 171 on Calendar of October 4, 1972

	PAPERS NUMBERED
Notice of Motion, Order to Show Cause and Affidavits	
Annexed Exhibits	1-17
Answering Affidavit	18-22
Replying Affidavit	23-28

Upon the foregoing papers this motion for an order vacating default judgment is denied. Despite the voluminous affidavits submitted in support of the instant application, no showing whatsoever has been made that the default was excusable or not deliberate.

DATED: November 1, 1972.

/s/ I.W.
J.S.C.

Plaintiff's Defendant's

County Clerk's No. 17506 1971

Spec. I Liber U14 Line 1, 1972

FILED
NOVEMBER 2, 1972
NEW YORK
COUNTY CLERK'S OFFICE

EXHIBIT "J"

ORDER OF THE SUPREME COURT, APPELLATE DIVISION DATED MAY 4, 1976

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 4, 1976.

UNITED INDUSTRIAL CORPORATION,
Plaintiff-Respondent,
against
GERALD SHREIBER and STANLEY WEISS,
Defendants-Appellants.

The above named defendants-appellants having moved for leave to reargue their appeal from the order of the Supreme Court, New York County, entered on November 1, 1972, which order was unanimously affirmed by order of this Court entered on February 2, 1976, or, in the alternative, for leave to appeal to the Court of Appeals.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Harvey G. Wolfe in support of said motion, and the affidavit of Louis C. Fieland in opposition thereto, and after hearing Mr. Harvey G. Wolfe for the motion, and Mr. Louis C. Fieland opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20 costs.

ENTER:

/s/ Hyman W. Gamso
HYMAN W. GAMSO
Clerk.

Supreme Court, U. S.
FILED
NOV 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

Docket No. 76-464

GERALD SHREIBER and STANLEY WEISS,

Petitioners,

vs.

UNITED INDUSTRIAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS C. FIELAND,
Counsel for Respondent
919 Third Avenue
New York, New York 10022

LOUIS C. FIELAND,
On the Brief in Opposition to
the Petition for Writ of Certiorari

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Jurisdiction	2
Question Presented	3
Restatement of the Case	3
Reasons for Denying the Petition	4
Conclusion	7

CASES CITED

Cases:

Cardinale v. *Louisiana*, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969) 2, 3

Fuentes v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 2000; 32 L. Ed. 2d 556 6

Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306, 314-315, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) .. 5

Owens v. *I.F.P. Corporation*, 374 F. Supp. 1032 (W.D. Ky. 1974; aff'd 419 U.S. 807, 95 S. Ct. 23, 42 L. Ed. 36 (1974) 6

Tacon v. *Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 346 (1973) 3

U.S. Code Cited:

28 U.S.C. 2101(c) 2

28 U.S.C. 1257(3) 2

PAGE

U.S. Constitution Cited:

Fourteenth Amendment 5

Miscellaneous Cited:

Civil Practice Law and Rules of the States of New York, § 3215(f)(i) 5, 6, 7

Civil Practice Law and Rules of the State of New York, § 3215(f) 2 .....5, 6, 7

IN THE

Supreme Court of the United States

Docket No. 76-464

GERALD SHREIBER and STANLEY WEISS,

Petitioners,

VS.

UNITED INDUSTRIAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners seek a writ of certiorari to the Supreme Court, Appellate Division, First Department, of the State of New York, an intermediate appellate Court of that State (1).*

The Court of Appeals of New York, the highest appellate Court of that state, dismissed the petitioners' motion for leave to appeal to that Court, on the ground that "the order sought to be appealed from does not finally deter-

---

* Numbers in parentheses refer to pages of the Petition.

mine the action within the meaning of the Constitution and involves the exercise of discretion of a type not reviewable by the Court of Appeals (9a-10a).

Petitioners were the defendants in the New York action. After their default, the judgment against the Petitioners was entered pursuant to findings of fact and conclusions of law made by the trial Judge, after a hearing and according to the evidence submitted (3a-5a). The judgment was entered approximately 5 years ago and was based upon the defendants' "fraud and misrepresentation" (3a-4a). The judgment was in accordance with the Notice endorsed upon the summons personally served upon the defendants (4-5) and was limited to the amount therein specified, although the plaintiff's actual damage was in excess thereof (8a-9a).

Jurisdiction

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. 1257(3). They seek a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review its Order and Decision entered on February 2, 1976.

At the outset it should be noted that the Petition is not timely filed within the purview of 28 U.S.C. 2101(c) and should be dismissed on that ground.

Further, the Petitioners, approximately 5 years after the judgment of the trial Court was entered, attempt to raise for the first time a question under the due process clause of the Fourteenth Amendment of the Constitution of the United States. Obviously the Courts below did not pass upon this question since it was never raised or preserved in any state court. This Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. Consequently, the writ should be dismissed on this second ground [*Cardinale* v. *Louisiana*, 394 U.S. 437, 89 S. Ct.

1161, 22 L. Ed. 2d 398 (1969); *Tacon* v. *Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 346 (1973)].

Question Presented

Under the indisputable facts of this case, was the due process clause of the Fourteenth Amendment of the Constitution of the United States violated? More specifically, as stated by the Petitioners:

> "Does Section 3215(f)(i) of the Civil Practice Law and Rules of the State of New York violate the due process clause of the Fourteenth Amendment to the United States Constitution when it does not require prior notice to Petitioners of an assessment of damages hearing held pursuant to the entry of a default judgment against Petitioners." (3)

Restatement of the Case

Petitioners' statement of the case (4-6) is divorced from the record and is inaccurate in a number of material respects. The indisputable facts are recited *infra*.

The Petitioners were personally served with a Summons with "Notice" in New York on May 6, 1971 (4). The Notice read as follows (2a):

> "Notice: The object of this action is recovery of damages suffered by defendants' fraud, misrepresentation, deceit, breach of contract and malfeasance.
>
> The relief sought is the sum of $250,000.00.
>
> Upon your failure to appear, judgment will be taken against you by default for the sum of $250,000.00 with interest from April 30, 1971 and the costs of this action."

The Petitioners were thus apprised of the specific consequences of their failure to appear in the action. They then retained counsel who, without any objection whatsoever to service of the summons, discussed the matter with opposing counsel and requested an extension of time to appear. This request was fully granted, and an executed stipulation extending the defendants' time to appear or answer was transmitted to their counsel (5). No appearance was ever made on behalf of the defendants (7) and no further communication of any kind was ever received from them or from their counsel (i.e., until they moved to open their default approximately one year after the judgment against them was entered).

In due course, an inquest and an assessment of damages was held pursuant to the provisions of Section 3215(a) of the Civil Practice Law and Rules of the State of New York (14a). The trial Court made findings of fact and conclusions of law based upon the evidence submitted, and judgment was entered pursuant to said findings, except that the plaintiff's recovery was limited to the $250,000.00 specified in the Notice on the summons, although the plaintiff's actual damages were $252,299.00 (3a-5a; 8a-9a).

At no time during the entire history of the New York action did the defendants therein address themselves to the issue of a meritorious defense to the action (13a).

Reasons for Denying the Petition

Petitioners specifically claim:

1. That the default judgment was based "upon a summons which does not set forth adequate notice of the basis of the alleged cause of action against them" (3). It is respectfully submitted that even a cursory examination of the Notice on the summons (set forth above) reveals that the nature of the plaintiff's claim and the judgment to be

entered in the event of the defendant's failure to appear, were made abundantly clear.

This Court, in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314-315, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), has defined the quality of the notice required by procedural due process as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

Measured by the standards established by *Mullane, supra,* the Notice endorsed upon the summons personally served upon the defendants gave them reasonable and adequate notice of the nature of the plaintiffs' claim and of the consequences of their failure to appear. The constitutional requirements of due process were thus fully satisfied.

2. The petitioners' second claim is that Section 3215(f)(i) of the Civil Practice Law and Rules of New York violates the due process clause of the Fourteenth Amendment "when it does not require prior notice to Petitioners of an assessment of damages herein held pursuant to the entry of a default judgment against Petitioners" (3).

Section 3215(f)2 of the New York Civil Practice Law and Rules provides (16a):

> "Where an application for judgment must be made to the Court, the defendant who has failed to appear

> may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally."

In the instant case, because plaintiff's claim was for unliquidated damages, application had to be made, and was made, to the Court, and the Petitioners could have had notice of the hearing for the assessment of damages if they had filed the demand specified in the quoted statute. Due process under the provisions of the Fourteenth Amendment does not require a hearing. All that is required is a notice and an opportunity to be heard—an opportunity which was afforded the Petitioners by the subject New York statute (*Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 2000, 32 L. Ed. 2d 556). Petitioners failed to file the statutory demand, and their failure to take advantage of the opportunity afforded them by Section 3215 did not result in lack of due process. The result was a waiver by the defendants of an opportunity to be heard.

However, assuming *arguendo* that Section 3215 of the New York Civil Practice Law and Rules did not afford the defendants an opportunity to be heard after their default in appearance on the issue of damages, the requirements of due process were nevertheless met because due process does not require such a notice [*Owens* v. *I.F.P. Corporation*, 374 F. Supp. 1032 (W. D. Ky. 1974), aff'd 419 U.S. 807, 95 S. Ct. 23, 42 L. Ed. 36 (1974)]. Petitioners have failed to cite a single case to the contrary. The cases cited by the Petitioners are all patently inapposite.

Conclusion

The Petition should be dismissed because it is untimely.

The Petition should be dismissed because it raises, or attempts to raise, a constitutional question never raised or preserved before. The Court of Appeals of New York was thus deprived of the first opportunity to consider the constitutionality of Section 3215 of the New York Civil Practice Laws and Rules. Matters such as these are among the most basic legislative concerns of each state, and considerations of federalism and comity require this Court to refrain from intruding in any way or from interfering with the procedures of the Courts of the State of New York.

The Petition should be denied because all the requirements of due process under the provisions of the Fourteenth Amendment of the Constitution of the United States were fully satisfied in the instant case.

Respectfully submitted,

Louis C. Fieland
Counsel for Respondent
919 Third Avenue
New York, New York 10022

Supreme Court, U. S.
FILED
DEC 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DOCKET NO. 76-464

GERALD SHREIBER and STANLEY WEISS,
Petitioners,

vs.

UNITED INDUSTRIAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RAYMOND M. VICTOR,
Counsel for Petitioners,
9th Floor,
1201 Chestnut Street,
Philadelphia, Pennsylvania 19107

RAYMOND M. VICTOR,
On the Petition

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Reply in Support of Certiorari 1

Conclusion 9

CASES CITED:

Griffin v. Griffin,
327 U.S. 220, 66 Sct. 556, 90 L.Ed. 635 (1946), rehearing denied 328 U.S. 876, 66 Sct, 975, 90 L.Ed. 1645 (1946) 5, 7

Owens v. I.F.P. Corporation,
374 F. Supp. 1032 (W.D. Kentucky (1974), aff'd 419 U.S. 807, 95 Sct. 23, 42 L.Ed.2d 36 (1974) .. 4, 5

U.S. CODES CITED:

28 U.S.C. 1257(c) 2

28 U.S.C. 2101(c) 1, 2, 9

MISCELLANEOUS CITED:

New York Civil Practice Laws and Rules
Section 3215 ..... 2, 3, 4

U.S. CONSTITUTION CITED:

Fourteenth Amendment 3, 4

REPLY IN SUPPORT OF CERTIORARI

Respondent filed a Brief in Opposition to Petition for Writ of Certiorari asserting that the "Petition should be dismissed because it is untimely; . . . because it raises or attempts to raise a constitutional question never raised or preserved before . . . [and because] all the requirements of due process under the provisions of the Fourteenth Amendment of the Constitution of the United States were fully satisfied in the instant case" (Brief in Opposition, P. 7).

Petitioners assert that each and every reason advanced by Respondent in opposition to the Petition for Writ of Certiorari is without basis in fact.

I. Respondent alleges that the Petition for Writ of Certiorari (hereinafter referred to as "The Petition") should be dismissed on the ground that it was "not timely filed within the purview of 28 U.S.C. 2101(c) . . ." (Brief in Opposition, P. 2).

In the instant case, the Supreme Court of New York, Appellate Division affirmed the trial court's denial of the motion to vacate the default judgment on February 2, 1976 (Petition, Exhibit J, P. 19a).

Motion for leave to appeal to the Court of Appeals of New York was denied by that Court on July 8, 1976 (Petition, Exhibit F, P. 10a).

28 U.S.C. 2101(c) provides "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

On October 1, 1976 the Petition before the Court was docketed, a time less than ninety (90) days from the date that the Court of Appeals of New York dismissed the notice for leave to appeal. This is certainly within the time period specified in 28 U.S.C. 2101(c).

Furthermore, 28 U.S.C. 1257(c), under which jurisdiction exists in the instant case; says, in pertinent part;

State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the *Highest Court for a State in which a decision could be had,* may be viewed by the Supreme Court as follows:

> "(3) by a writ of certiorari . . . where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States." [Emphasis supplied]

Under the above statute, the Petition could not have been filed prior to the July 8, 1976 decision by the Court of Appeals of New York dismissing the motion for leave to appeal, and therefore Petitioners had ninety (90) days from July 8, 1976 to file the Petition. This was done on October 1, 1976.

II. Respondent alleges that the Petition should be dismissed because it raises or attempts to raise, a constitutional question never raised or preserved before and thus the Court of Appeals of New York was therefore deprived of the first opportunity to consider the constitutionality of Section 3215 of the New York Civil Practice Laws and Rules.

It should be clear that the decision and opinion of the New York Supreme Court, Appellate Division, rendered by that Court on February 2, 1976 (Petition, Exhibit G, 11a-3a) gave rise to the challenge in the Petition of Section 3215 of the New York Civil Practice Laws and Rules. The Court of Appeals dismissed the motion filed by Petitioners' New York counsel for leave to appeal, thus the constitutional attack on the above New York rule could not be raised in the highest state court.

Furthermore, the issue raised by Petitioners of lack of due process was raised implicitly throughout the lower courts in New York.

Therefore, it should be clear that when there is a serious violation of due process, as in the instant case, the allegation of a violation of due process in the motion to vacate the default judgment filed in New York and in the Appeal to the Supreme Court of New York, Appellate Division certainly preserves the issue for consideration in this Court.

III. Respondent alleges that the Petition should be denied because all the requirements of due process under the provision of the Fourteenth Amendment of the United States Constitution were fully satisfied in the instant case. Nothing could be further from the truth. The violation of Petitioners' due process rights was so blatant that it is submitted that it is shocking to the conscience of this Court.

Respondent argues that Petitioners could have had notice of the hearing for the assessment of damages if they filed a demand as specified in Section 3215 F(2) of the New York Civil Practice Laws and Rules. Respondent claims that failure to do so was a waiver of an opportunity to be heard. (Brief in Opposition, P. 4)

It should be clear that a fraud was committed on Petitioners in Respondent's failure to give Petitioners notice of the assessment of damages hearing based on a claim inherently one of unliquidated damages and particularly when no one, including Petitioners or those purporting to act as their counsel, was given notice of the entry of a default judgment. To construe Section 3215 F(2) of the Civil Practice Laws and Rules as providing that a failure to demand a notice of a hearing based on a judgment taken without notice to the Petitioners constitutes a waiver of that right is to misconstrue that statute. Clearly, if one has no notice that a default judgment has been entered against him, he cannot demand notice of a subsequent assessment of damages hearing.

Furthermore, Respondent took the default judgment based on a claim of unliquidated damages and, knowing that neither Petitioners nor their counsel knew of the default judgment or when it was taken, proceeded to the hearing to "prove" its damages. To construe the failure of Petitioners to demand notice of the assessment of damages hearing under these circumstances as a waiver of their rights to do so is to render the due process clause of the Fourteenth Amendment and the requirement of notice and an opportunity to be heard inoperative whenever one party can pervert the judicial process to secure a sneak judgment.

Respondent's reliance on *Owens v. I.F.P. Corporation*, 374 F. Supp. 1032 (W.D. Kentucky 1974), *aff'd* 419 U.S. 807, 95 Sct. 23, 42 L.Ed.2d 36 (1974) is misplaced since that case did *not* hold that notice is not required for a hearing on assessment of damages following a default as Respondent suggests. (Brief in Opposition, P. 6)

The Court in *Owens, supra*, dealt with whether a summons served on a defendant in Kentucky violated due process in not conveying enough information to a defendant to enable a defendant so served to take the necessary steps to avoid default. The Court held, inter alia, that the Kentucky summons did not violate due process and was not confusing when it conveyed the fact that the defendant should "appear and defend within twenty (20) days after service" or "judgment will be taken against you for the relief demanded in the complaint."

In the instant case Petitioners are not, for the purpose of this Petition, contesting the validity of the summons or the validity of the default. Petitioners contend that the failure to give notice of assessment of damages hearing based on the unliquidated claims set forth in the summons is a violation of due process. Accordingly, *Owens, supra,* is inapplicable.

Petitioners submit that the case of *Griffin v. Griffin*, 327 U.S. 220, 66 Sct. 556, 90 L.Ed. 635 (1946), *rehearing denied* 328 U.S. 876, 66 Sct. 975, 90 L.Ed. 1645 (1946), decided by this Court, stands for the proposition that failure to give notice of an assessment of damages hearing to a person over whom the Court has in personam jurisdiction constitutes a denial of due process.

The *Griffin* case has its origin in a divorce and alimony proceeding. Wife obtained a divorce from husband in 1924 by a divorce proceeding commenced under the jurisdiction of the Supreme Court of New York, a Court of original jurisdiction. The Husband appeared and submitted himself to the jurisdiction of the New York Court. Subsequently, in 1926, an award of alimony was granted in favor of Wife. By 1935, the alimony was not paid in accordance with a court order. Wife then moved to obtain judgment for alimony arrearages. Meanwhile, Husband had moved to the District of Columbia. Not-

withstanding, Husband appeared in the Supreme Court of New York proceeding and contested Wife's motion to reduce the alimony arrearages to judgment. The Court entered judgment against him for $18,493.64.

Next follows the significant aspect of this case dealing with the failure to give notice and violation of due process. In early 1938, Wife filed a motion with the Supreme Court of New York for a judgment on alimony arrearages to that date. Her motion comprised two parts: the first requested a judgment be entered in the amount of $18,493.64, which she had already received from the Court, with interest; and for an additional judgment from the time of the first judgment to the time of her motion, i.e., 1936 to 1938. The Husband was given no notice with respect to the assessment of damages hearing to be held in 1938 pursuant to the Wife's motion for alimony arrearages to be brought up to date, especially covering the period from 1936 to 1938.

It was conceded that the Husband received no notice with respect to the assessment of damages hearing in 1938.

The Supreme Court of New York in 1938 rendered a final judgment against Husband in favor of Wife in the amount of $25,382.75. This judgment comprised the earlier judgment of $18,493.64, with interest, and subsequent alimony arrearages allegedly due from 1936 to 1938, in the amount of $3,750, with additional interest of $550. It is the hearing on the assessment of alimony arrearages resulting in an additional award of $3,750, with interest of $550 on which Husband received no notice.

The violation of due process occurred when Husband was not given notice of the 1938 hearing at which time additional damages were assessed against him with resultant judgment.

Wife sought to enforce the New York judgment in the District Court for the District of Columbia. Husband contested the judgment on the grounds that the judgment of 1938 was entered without notice to him and for that reason was null and void for want of due process. The District Court and the Circuit Court of Appeals dismissed the objection and found the judgment valid and in favor of Wife.

This Court issued a Writ of Certiorari and reversed the lower courts, holding, that there was a want of judicial due process in the failure to give Husband notice of the 1938 hearing on assessment of damages. It stated that while the 1936 judgment was apparently valid because the Husbad had entered and defended, nevertheless, the 1938 judgment, a new proceeding, entitled Husband to notice of such proceeding. It was conceded that the 1938 judgment was entered without actual notice to or appearance for the Husband and without any form of service of process calculated to give him notice of the proceedings. The Court stated that there was a constitutional precept that a court may not act to give a personal judgment in absence of notice.

In the instant case, Petitioners had no notice of the assessment of damages hearing and thus they had no opportunity to defend against the extent of damages. Even though Petitioners were served with a summons indicating a judgment would be taken against them if they failed to appear within twenty (20) days, Petitioners had the right to be notified as to the hearing on the assessment of damages.

As the Supreme Court said in *Griffin, supra,* "while it is undoubtedly true that the 1926 decree . . . gave Petitioner notice at the time of its entry that further proceed-

ings might be taken to docket in judgment form the obligation to pay installments occurring under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not." 327 U.S. 229, 66 Sct. 561, 90 L.Ed. 335.

The *Griffin* case is a clear decision by this Court that due process requires a form of notice reasonably calculated to reach a party where an assessment of damages hearing is to be held against him and for which he may be responsible, notwithstanding the Court of original jurisdiction over said party.

CONCLUSION

The Petition was timely filed within the requirement of U.S.C. 2101(c).

The question involving the constitutionality of Section 3215 of the New York Practice Laws and Rules could not be raised in the Court of Appeals of New York since said Court dismissed Petitioners' motion for leave to appeal. Furthermore, the motion to vacate default judgment filed with the Supreme Court of New York and the appeal to the New York Supreme Court, Appellate Court, Appellate Division implicitly raised the issue of the Constitutional deprivation claimed in that Petition and as such was preserved for review.

The requirement of notice and an opportunity to be heard was not satisfied in the instant case due to the blatant disregard for the due process right of the Petitioners by the manner in which the assessment of damages was held without notice to Petitioners and as such renders the judgment void.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND M. VICTOR
Attorney for Petitioners

1201 Chestnut Street,
Ninth Floor,
Philadelphia, Pennsylvania 19107